

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MARCEL D. THOMPSON,

Petitioner,

vs.

FRANKIE SUE DEL PAPA, *et al.*,

Respondents.

3:05-cv-0468-HDM-RAM

**ORDER**

This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, by Marcel Thompson, a Nevada prisoner. The action comes before the court with respect to its merits. The court will deny the petition.

**I. Facts and Procedural Background**

The state charged the petitioner by indictment in the Second Judicial District for Washoe County with five counts of sexual assault on a child under the age of fourteen. Exhibit 1.<sup>1</sup> After a jury trial, petitioner was convicted of counts I, II, III and V as charged. Exhibits 22 and 25. The trial court sentenced petitioner to four consecutive terms of life in prison with the possibility of parole. Exhibits 27 and 28. A judgment of conviction was entered on July 19, 1994. Exhibit 28.

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<sup>1</sup> The exhibits cited in this order in the form "Exhibit \_\_," are those filed by petitioner in support of his amended petition for writ of habeas corpus and are located in the record at docket ## 2, 3, 4, and 5.

1           Petitioner appealed, arguing one ground for relief, that the trial court erred in relying  
2 on erroneous evidence at sentencing. Exhibits 29 and 32. The Nevada Supreme Court dismissed the  
3 appeal, finding that petitioner had failed to show that the trial court relied on highly suspect evidence  
4 in sentencing him. Exhibit 35. Remittitur issued on January 12, 1996. Exhibit 36. Petitioner then  
5 filed a state habeas corpus petition raising numerous claims of prosecutorial misconduct, ineffective  
6 assistance of trial counsel and appellate counsel and trial court error. Exhibit 37. After holding an  
7 evidentiary hearing on the issues, the trial court denied the petition. Exhibits 48, 49 and 50. On  
8 appeal the Nevada Supreme Court affirmed the district court's denial of the petition. Exhibit 56.  
9 Remittitur issued on August 4, 2000. Exhibit 57.

10           Petitioner then filed a second petition for writ of habeas corpus in the state court,  
11 alleging the indictment was defective and his sentence is illegal. Exhibit 58. Respondents moved to  
12 dismiss the petition, arguing the petition was untimely and successive and because the claims were  
13 without merit. Exhibit 60. Petitioner stipulated to the dismissal. The district court agreed and  
14 dismissed the petition. Exhibit 62. Petitioner did not appeal to the Nevada Supreme Court.

15           Petitioner mailed a federal habeas corpus petition to this Court on June 25, 2001.<sup>2</sup>  
16 Respondents moved to dismiss the petition stating that some of the claims were unexhausted. This  
17 Court granted the motion to dismiss. Petitioner asked the court to dismiss the petition without  
18 prejudice so that he could return to state court to exhaust his claims. This Court dismissed the  
19 petition without prejudice on October 10, 2002, and administratively closed the case.

20           Petitioner filed another state habeas corpus petition, again arguing that the indictment  
21 was defective. Exhibit 73. The state district court dismissed the petition as untimely and  
22 successive, and found that petitioner had not demonstrated a basis to excuse the procedural bars.  
23 Exhibit 75. On appeal the Nevada Supreme Court affirmed the lower court's dismissal of the  
24 petition. Exhibits 78 and 81. The court agreed that petitioner had not shown good cause to excuse  
25 the late filing of the state petition. *Id.* Moreover, the court noted the claims raised in the third

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26           <sup>2</sup> Case 3:01-cv-0402-HDM-RAM.

1 habeas petition could have been raised in the first petition. *Id.* Remittitur issued on May 18, 2005.  
2 Exhibit 80.

3 On October 18, 2005 this Court granted petitioner's motion to reopen the case.  
4 Counsel was appointed to represent petitioner (docket #13) and an amended petition for writ of  
5 habeas corpus was filed on July 24, 2006 (docket #22). Respondents have filed an answer and  
6 petitioner has filed a reply to that answer (docket #30 and 36).

## 7 **II. Federal Habeas Corpus Standards**

8 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides the legal  
9 standard for the Court's consideration of this habeas petition:

10 An application for a writ of habeas corpus on behalf of a person in  
11 custody pursuant to the judgment of a State court shall not be granted  
12 with respect to any claim that was adjudicated on the merits in State court  
proceedings unless the adjudication of the claim --

13 (1) resulted in a decision that was contrary to, or involved an  
14 unreasonable application of, clearly established Federal law, as  
determined by the Supreme Court of the United States; or

15 (2) resulted in a decision that was based on an unreasonable  
16 determination of the facts in light of the evidence presented in the State  
court proceeding.

17 28 U.S.C. §2254(d).

18 The AEDPA "modified a federal habeas court's role in reviewing state prisoner  
19 applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are  
20 given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). A state  
21 court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28  
22 U.S.C. § 2254, "'if the state court applies a rule that contradicts the governing law set forth in [the  
23 Supreme Court's] cases'" or "'if the state court confronts a set of facts that are materially  
24 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result  
25 different from [the Supreme Court's] precedent.'" *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)  
26 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

1 A state court decision is an unreasonable application of clearly established Supreme  
2 Court precedent “‘if the state court identifies the correct governing legal principle from [the Supreme  
3 Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.’”  
4 *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The unreasonable application clause  
5 “requires the state court decision to be more than incorrect or erroneous”; the state court’s  
6 application of clearly established law must be objectively unreasonable. *Id.* (quoting *Williams*, 529  
7 U.S. at 409). *See also Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004).

8 In determining whether a state court decision is contrary to, or an unreasonable  
9 application of, federal law, this Court looks to a state court’s last reasoned decision. *See Ylst v.*  
10 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir.  
11 2008) (en banc).

12 Moreover, “a determination of a factual issue made by a State court shall be presumed  
13 to be correct,” and the petitioner “shall have the burden of rebutting the presumption of correctness  
14 by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

### 15 **III. Discussion**

#### 16 **A. Ground One**

17 In his first ground for relief petitioner alleges that he was denied his Fifth and Sixth  
18 Amendment rights to counsel as trial counsel (1) failed to insist on his presence when the court  
19 interviewed the jurors and discharged juror Munoz; (2) failed to consult with petitioner about the  
20 juror changes; and (3) failed to object and move for a mistrial in light of the errors.

21 In order to prove ineffective assistance of counsel, petitioner must show (1) that  
22 counsel acted deficiently, in that his attorney made errors so serious that his actions were outside the  
23 scope of professionally competent assistance and (2) the deficient performance prejudiced the  
24 outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984).

25 Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
26 performance of counsel resulting in prejudice, “with performance being measured against an

1 ‘objective standard of reasonableness,’ . . . ‘under prevailing professional norms.’” *Rompilla v.*  
2 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an  
3 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary  
4 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,  
5 5 (2003). There is a strong presumption that counsel’s conduct falls within the wide range of  
6 reasonable professional assistance. *Id.*

7           While the jury was deliberating, juror Bates wrote a note to the trial court stating that  
8 she and the other members of the juror believed that juror Munoz did not sufficiently understand  
9 English and thus the jury could not properly deliberate. Exhibit 22, T 304-05. The trial court  
10 questioned all of the jurors, and each indicated that juror Munoz appeared to not completely  
11 understand the language and the charges. *Id.* at 305-09. One of the jurors told the trial judge that  
12 juror Munoz also stated that she did not belong on the jury because she was not a United States  
13 citizen. *Id.* at 309. The court made a finding that it was going to dismiss juror Munoz because of  
14 her inability to speak English and because she was not a United States Citizen. *Id.* at 312. The  
15 court told the jury that they could not deliberate while they were waiting for the alternate and that  
16 upon her arrival they must start deliberations from the beginning. *Id.*

17           The court then called juror Munoz and asked whether she was having difficulty with  
18 deliberations. Juror Munoz told the court that she did not understand English very well. *Id.* at 313.  
19 The court asked the juror whether she was a citizen or just a legal resident of the United States. *Id.*  
20 at 314. The juror indicated that she was a permanent resident but is not a citizen of the United  
21 States. *Id.* The court dismissed juror Munoz and called the alternate juror back to deliberate. *Id.*  
22 The petitioner was not present during these proceedings. *Id.* at 305. Defense counsel told the court  
23 that he was waiving petitioner’s right to be present. *Id.*

24           The state district court denied petitioner’s claims that trial counsel was ineffective for  
25 failing to object to the disqualification of the juror and for failing to ensure petitioner’s presence and  
26 consult with him on the issue. Exhibit 50 at 5. The district court found that any objection to the

1 disqualification of the juror would have been futile as NRS 6.010 and the Nevada Constitution  
2 require that jurors be United States citizens. *Id.* The court stated that while petitioner was not  
3 present at the proceeding, the disqualification of the juror was akin to a ministerial function of the  
4 court and nothing could have been added had petitioner been present. *Id.* The Nevada Supreme  
5 Court affirmed the court's denial on appeal, stating the district court had no choice but to dismiss  
6 juror Munoz. Exhibit 56 at 4. The court found there was no error in failing to instruct the alternate  
7 juror because the court had told the remaining jurors that they were to restart deliberations from the  
8 beginning. *Id.*

9           An accused has the right to be present at every critical stage of a trial "where his  
10 absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819  
11 n.15 (1975) (citations omitted); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (stating "a  
12 defendant has a due process right to be present at a proceeding 'whenever his presence has a relation,  
13 reasonably substantial, to the fulness of his opportunity to defend against the charge'") (quoting  
14 *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

15           Petitioner cites to *United States v. Hanno*, 21 F.3d 42 (4th Cir. 1994) and contends  
16 that the disqualification of a juror was a critical stage of the proceeding. In *Hanno* the Fourth Circuit  
17 concluded that a defendant had a right to be present when a jury was "dismembered," similar to the  
18 defendant's right to be present at the impaneling of a jury. *Id.* at 46-47. However, in *Hanno*,  
19 several jurors were removed without notice to the defendant *or* his attorney, neither were present at  
20 the proceeding, and there was no record of the removal. *Id.* at 44. Such is not the case here.  
21 Defense counsel was present and there is a clear record of the juror's removal. Moreover, the  
22 Nevada Statutes and Constitution required that juror Munoz be removed as she was not a United  
23 States citizen.

24           The Fourth Circuit holdings cited by petitioner are not "clearly established" federal  
25 law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d). The state district court  
26 was mandated by statute to remove juror Munoz and therefore that hearing was not a critical stage in

1 the proceedings in which the petitioner's presence was required.

2 Even if the juror disqualification proceeding in this case was a "critical stage" of the  
3 proceeding, a defendant may waive his presence at such a proceeding. *Johnson v. Zerbst*, 304 U.S.  
4 458, 464 (1938); *United States v. Berger*, 473 F.3d 1080, 1095 (9th Cir. 2007). However, such a  
5 waiver must be voluntary, knowing, and intelligent. *Berger*, 473 F.3d at 1095 (citing *Campbell v.*  
6 *Wood*, 18 F.3d 662, 671-72 (9th Cir. 1994)). Petitioner asserts that he did not voluntarily waive his  
7 presence at the proceeding, and that counsel did not inform him of the proceeding. If petitioner's  
8 absence at the "critical stage" was involuntary, then a violation of due process occurred unless the  
9 court determines that the error is harmless. *Id.* at 1096. "Constitutional error is harmless if a court  
10 concludes 'beyond a reasonable doubt that the error complained of did not contribute to the verdict  
11 obtained.'" *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). It appears that any error on  
12 the part of the court in failing to ensure petitioner's presence at the proceeding was harmless, as the  
13 court was required to remove juror Munoz and replace her with the alternate juror. The error was  
14 not in removing juror Munoz but in removing her without petitioner's presence. Petitioner's  
15 presence at the proceeding would not have changed the outcome of the trial.

16 This claim must fail as there is no indication that the Nevada Supreme Court  
17 unreasonably applied federal law as determined by the United States Supreme Court in denying  
18 petitioner's claims. Trial counsel was likely not ineffective for failing to insist on petitioner's  
19 presence at the proceeding, for failing to consult with the petitioner about the juror changes, or for  
20 failing to object to the removal of juror Munoz or move for a mistrial.

21 Petitioner also contends that the seating of the alternate juror was in error, as the trial  
22 court did not reconvene all of the jury members, seat the alternate juror, and resubmit the case to the  
23 jury as is required under NRS 16.080. Section 16.080 specifically states:

24 After the impaneling of the jury and before the verdict, the court may  
25 discharge a juror upon a showing of his sickness, a serious illness or death  
26 of a member of his immediate family, an undue hardship, an extreme  
inconvenience, any other inability to perform his duty or a public necessity.  
Alternate jurors, in the order in which they were selected, shall replace  
jurors who become unable or disqualified to perform their duties. **If an**

**alternate juror is required to replace a regular juror after the jury has retired to deliberate, the court shall recall the jury, seat the alternate and resubmit the case to the jury.** If no alternate juror has been selected, the trial may proceed with the remaining jurors, only if the parties so agree. If the parties do not so agree, the jury shall be discharged, and a new jury then or afterwards impaneled.

(Emphasis added).

In this case the trial court handled the discharge of juror Munoz and the seating of the alternate juror as follows:

Ladies and gentlemen of the jury, I'm going to ask that you await the return of the alternate juror. We have called the alternate juror, but she is in the north valleys, it will take approximately 20 more minutes for her to get here.

You must not deliberate while she is gone and you must start from scratch once she is here. You must begin your deliberations anew with her present.

...

Mrs. Bates, you are charged with seeing that the jury does not deliberate until the full twelve people are present and that the deliberations begin anew.

Exhibit 22 at 312-13. The Nevada Supreme Court, in affirming the denial of this claim, stated:

Because the Nevada Constitution and NRS 6.010 require jurors to be citizens, the district court had no choice but to dismiss the noncitizen juror upon discovery of the problem. *See* NRS 6.010 (every qualified elector is a qualified juror in the county in which he resides); Nev. Const. Art. 2, § 1 (United States citizenship is required before a person may become an elector). Additionally, because the district court instructed the remaining jurors to restart deliberations with the alternate juror, an additional instruction to the alternate juror was unnecessary. *See Carroll v. State*, 111 Nev. 371, 373, 892 P.2d 586, 587 (1995) (policy for requiring deliberations to begin anew is to alleviate any potential pressure the original jury might place on the alternate). [FN 5: Because we conclude that the removal of the noncitizen juror and replacement with the alternate was proper, we also conclude that Thompson's appellate counsel's failure to address the issue on direct appeal did not fall below an objective standard of reasonableness.] Therefore, Thompson's trial counsel's action did not fall below an objective standard of reasonableness. Finally, after reviewing the transcripts surrounding the removal, we conclude that Thompson has not shown that his trial counsel's failure to examine the remaining jurors or the alternate was prejudicial.

Exhibit 56 at 4.



1           It does not appear that the Nevada Supreme Court's order was an objectively  
2 unreasonable application of United States Supreme Court law. The issue is whether the Nevada state  
3 court procedure of discharging a juror and seating an alternate juror complies with the Sixth  
4 Amendment. The "essential feature of a jury obviously lies in the interposition between the accused  
5 and his accuser of the commonsense judgment of a group of laymen, and in the community  
6 participation and shared responsibility that results from that group's determination of guilt or  
7 innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970). In *Miller v. Stagner*, 757 F.3d 988, 995  
8 (9th Cir. 1985), the Ninth Circuit found that the state trial court's discharge and replacement of jurors  
9 did not deprive the criminal defendant of the essential feature of a jury, nor did it violate his rights to  
10 trial by jury and due process. In that case, during open court the trial judge discharged two jurors, and  
11 instructed the jury to set aside and disregard earlier deliberations and to begin deliberating anew. *Id.*  
12 *See also Henderson v. Lane*, 613 F.2d 175, 177 (7th Cir. 1980).

13           In the instant case, the trial judge, in open court, properly discharged juror Munoz.  
14 While the trial court did not completely comply with NRS 16.080, in that the court did not recall the  
15 full jury, including the alternate, and resubmit the case to the jury, the trial judge did instruct the  
16 remaining eleven jurors that they were to start the deliberations anew *only* when the alternate juror  
17 arrived. Moreover, the alternate juror was instructed with the original jurors at the close of the case.  
18 Exhibit 56. It does appear that the essential feature of the jury was preserved in this case.

19           Although the Nevada Supreme Court did not cite to federal case law, the court did cite  
20 to *Carroll v. State*, 892 P.2d 586 (Nev. 1995) in affirming the denial of this claim. In *Carroll* the  
21 court determined that the trial court's failure to comply with NRS 175.061 (now NRS 16.080) was  
22 harmful error. *Id.* at 587-88. The court stated that deliberations were to begin anew so that an  
23 alternate juror was not pressured to reach a conclusion, and cited to *United States v. Lamb*, 529 F.2d  
24 1153 (9th Cir. 1975) (discussing the issue of how a jury can coerce an alternate, who is seated after a  
25 juror discharge, to agree with a decision without deliberating). *Id.* at 587. The court determined that  
26 the alternate may have been influenced or coerced, as the original jury had deliberated for two days

1 and the reconstituted jury deliberated for only a couple of hours. *Id.* at 588.

2           The defendant does not argue, and the record does not support, a contention that the  
3 original eleven jurors coerced the alternate juror to agree with their decision, in violation of the Sixth  
4 Amendment. The original twelve jurors began deliberations at 11:57 am. Exhibit 56 at 302. At 3:57  
5 pm the problem with juror Munoz was brought to the court's attention. *Id.* at 304. The jury, with the  
6 alternate that replaced Munoz, then met to begin deliberations anew at 4:35 pm. Exhibit 1. The jury  
7 then recessed at approximately 7:30 p.m. for one and one half hours. Exhibit 56. The jury returned to  
8 continue deliberations at 9:00 pm. Exhibit 56 at 319. At 9:40 pm the jury reached a verdict. In this  
9 case the jury had only been deliberating for approximately four hours prior to the discharge of the  
10 juror. The reconstituted jury deliberated for at least three to three and one half hours.

11           The Nevada Supreme Court did not unreasonably apply federal law in affirming the  
12 denial of this claim. The court will deny this claim.

### 13           **B. Ground Two**

14           In his second claim for relief petitioner alleges that he was denied his right to effective  
15 assistance of appellate counsel under the Sixth and Fourteenth Amendments when appellate counsel  
16 failed to raise on appeal the issue of the trial court's juror errors in removing juror Munoz and seating  
17 the alternate juror.

18           The state district court denied this claim, finding that no error occurred with the  
19 disqualification of one juror and the seating of the alternate. Exhibit 50. Moreover, the court  
20 determined that the Nevada Supreme Court would not have found the claim meritorious on appeal.  
21 *Id.* The Nevada Supreme Court affirmed the denial of this claim on appeal, stating that because it  
22 found the removal of the juror proper, appellate counsel was not ineffective for failing to raise the  
23 claim on appeal. Exhibit 56.

24           "Claims of ineffective assistance of appellate counsel are reviewed according to the  
25 standard announced in *Strickland*." *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002). A  
26 petitioner must show that counsel unreasonably failed to discover nonfrivolous issues and there was a

1 reasonable probability that but for counsel's failures, he would have prevailed on his appeal. *Smith v.*  
2 *Robbins*, 528 U.S. 259, 285 (2000).

3           The Nevada Supreme Court's determination was not an objectively unreasonable  
4 application of federal law. As was noted in petitioner's first claim, it is likely that the disqualification  
5 of juror Munoz was proper and any error in the court's or counsel's failure to secure petitioner's  
6 presence was harmless. Appellate counsel would not be considered ineffective for failing to raise  
7 meritless issues on appeal. *Wildman v. Jackson*, 261 F.3d 832, 840 (9th Cir. 2001). The court will  
8 deny this claim.

9           **C. Ground Three**

10           In his third claim petitioner contends that he was denied his Sixth and Fourteenth  
11 Amendment rights to counsel when trial counsel failed to seek a hearing under NRS 51.385 to  
12 challenge the improper admission of the victim's prior consistent statements. At trial witnesses  
13 Gotlib, Coulter, and Thompson related the victim's out-of-court statements regarding the offenses to  
14 the jury. Exhibits 21 and 22.

15           The state district court found this claim to be without merit, stating that first much of  
16 the testimony was otherwise admissible. Exhibit 50 at 6-7. Moreover, the court stated that NRS  
17 51.385 did not apply to witness under the age of 10. *Id.* at 7. The Nevada Supreme Court affirmed  
18 the denial of this claim, finding that trial counsel did not fall below an objective standard of  
19 reasonableness. Exhibit 56 at 1 n.1.

20           The Nevada Supreme Court's decision was not an objectively unreasonable  
21 application of federal law. Admission of hearsay statements do not violate a defendant's  
22 Confrontation Clause rights if the declarant is available at trial for cross-examination. *See California*  
23 *v. Green*, 399 U.S. 149, 157-64 (1970); *United States v. Valdez-Soto*, 31 F.3d 1467, 1470-71 (9th Cir.  
24 1994); *see also Bockting v. Bayer*, 505 F.3d 973, 978 (9th Cir. 2007) (holding that to introduce out-  
25 of-court statements at trial, it must be shown that the declarant will testify at trial or is unavailable,  
26 and if unavailable, the statements must be adequately reliable or trustworthy) (citing *Ohio v. Roberts*,

1 448 U.S. 65-66 (1980)).<sup>3</sup>

2 The victim did testify at trial, and was subject to cross-examination. Moreover,  
3 although the petitioner states that the victim had a motive to lie, and the hearsay statements should not  
4 have been admitted, the petitioner had an adequate opportunity to question the victim about her  
5 accusations, her statements to witnesses Gotlib, Coulter, and Thompson and her motives to lie. There  
6 is no indication that the Nevada Supreme Court's determination that trial counsel was not ineffective  
7 for failing to hold a hearing pursuant to NRS 51.385 was objectively unreasonable. This claim will  
8 be denied.

#### 9 **D. Ground Four**

10 In his fourth claim for relief petitioner alleges that his Sixth and Fourteenth  
11 Amendment rights were violated when appellate counsel failed to raise on appeal the issue that the  
12 trial court improperly allowed the victim's prior consistent statements into evidence.

13 The state district court denied this claim, as was noted above, finding that the hearsay  
14 statements were otherwise admissible. Exhibit 50. The court also determined that appellate counsel  
15 was not ineffective for failing to raise this claim as counsel would not have been successful in  
16 attempting to show that the trial court committed error in not holding a hearing under NRS 51.385.  
17 *Id.* The Nevada Supreme Court affirmed the denial of this claim, stating that appellate counsel's  
18 actions did not fall below an objective standard of reasonableness, and thus the claim was without  
19 merit. Exhibit 56 at 1 n.1.

20 The Nevada Supreme Court did not unreasonably apply federal law. As was noted in  
21 the previous claim, it does not appear that the admission of the victim's hearsay statements violated  
22 the Confrontation Clause. Therefore, appellate counsel would not be ineffective for failing to raise  
23 this claim on appeal, as the issue does not have merit and the outcome of the appeal would not have  
24 been different. *Wildman v. Jackson*, 261 F.3d 832, 840 (9th Cir. 2001). The court will deny this

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26 <sup>3</sup> While *Roberts* was overruled by *Crawford v. Washington*, 541 U.S. 36 (2004), *Crawford* is not applicable in this case as the United States Supreme Court has held *Crawford* will not be applied retroactively to cases on collateral review. *Whorton v. Bockting*, 127 S. Ct 1173 (2007).

1 claim.

2 **E. Ground Five**

3 In his fifth claim for relief petitioner asserts that his Sixth and Fourteenth Amendment  
4 rights were violated when appellate counsel failed to argue on appeal that the trial court improperly  
5 interfered with the presentation of his defense. Petitioner attempted to present the testimony of his  
6 wife that the size of his genitalia was such that it would have caused considerably more damage to the  
7 victim than the victim testified to at trial. Exhibit 21.

8 At trial Glorietta Thompson, petitioner's then wife and the victim's mother, testified as  
9 to the size of petitioner's genitalia, and that she did not know if he could have had sexual intercourse  
10 with her daughter as his penis was too large for a little girl. Exhibit 21, T 159. The court allowed the  
11 witness to show the jury the size of petitioner's genitalia by using her hands. *Id.* at T 159-60.  
12 However, the trial judge would not allow the witness to testify as to the physical effects of sexual  
13 penetration on the victim, i.e. that there would have been more physical injury to the victim if sexual  
14 intercourse had occurred. *Id.* at T 162-71. The evidence at trial had shown that the victim clearly had  
15 been subjected to sexual penetration. Exhibit 21.

16 The state district court held an evidentiary hearing, and appellate counsel testified that  
17 she did not raise the instant claim on appeal because she was of the opinion that the trial judge's  
18 determination to exclude witness Thompson's testimony without a medical expert first testifying was  
19 correct. Exhibit 48, T 68-69. The state district court denied petitioner's claim, stating:

20 The court finds that if the issue had been raised on appeal the Supreme  
21 Court would have ruled that evidentiary questions are addressed to the  
22 sound discretion of the trial court. *See Dominguez v. State*, 112 Nev. Adv.  
23 Opn. 89, 917 P.2d 1364, 1372 (1996). The Court would further have ruled  
24 that the trial court did not abuse her discretion in refusing to allow the  
25 witness to voice an opinion concerning the probable effect of sexual  
26 penetration to someone other than herself. The witness was allowed to  
voice her opinion that Thompson was unusually large, and to demonstrate  
his size using her hands. The rest of her proposed testimony was properly  
excluded. [FN 1: This judge might have reached a different conclusion and  
allowed the evidence. The issue, however, is whether the Supreme Court  
would have found exclusion of the evidence to be an abuse of discretion.]  
Accordingly, the court finds that counsel's decision not to raise the issue  
was a reasonable decision and that petitioner was not prejudiced by

1 counsel's failure to present the claim on direct appeal.  
2 Exhibit 50 at 4. The Nevada Supreme Court affirmed the denial of this claim. Exhibit 56 at 3. The  
3 court stated that appellate counsel did not fall below an objective standard of reasonableness in  
4 failing to raise the issue on appeal, as "the district court, in its discretion, properly found the  
5 suppressed testimony to be irrelevant." *Id.* at 3 n.3. The court noted that Thompson's wife was  
6 allowed to testify to the substance of the defense. *Id.*

7 Criminal defendants must be afforded the opportunity to present a complete defense.  
8 *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).  
9 However, trial courts have discretion to "to exclude evidence that is 'repetitive..., only marginally  
10 relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane*, 476  
11 U.S. at 689-90 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

12 Petitioner has failed to meet his burden of establishing that the Nevada Supreme  
13 Court's decision was contrary to, or an unreasonable application of federal law. Petitioner was  
14 afforded an opportunity to present a portion of his defense, and the state trial court, in its discretion,  
15 determined the rest of the proposed testimony was not relevant. The Nevada courts' findings that the  
16 trial judge did not abuse her discretion in limiting the testimony of witness Thompson is presumed  
17 correct. 28 U.S.C. § 2254(e)(1); *Dres v. Campoy*, 784 F.2d 996, 998 (9th Cir. 1986) (noting  
18 evidentiary rulings are reviewed for an abuse of discretion). Petitioner has not shown that the court's  
19 determination that appellate counsel did not perform deficiently is unreasonable in light of the  
20 evidence and federal law.

#### 21 **F. Ground Six**

22 In ground six petitioner alleges that his Sixth and Fourteenth Amendment rights were  
23 violated when trial counsel failed to obtain and properly utilize an expert witness. Petitioner  
24 contends that trial counsel failed to hire an expert to testify about the size of his genitalia and the  
25 damage that would have occurred had petitioner had sexual intercourse with the victim.

26 At the evidentiary hearing held in the state court petitioner presented witness Gordon

1 Lee Nitz, a doctor specializing in urology. Exhibit 48, T 5-7. Dr. Nitz told the state court that it was  
2 his opinion that had the petitioner had sexual intercourse with a nine year old girl she would have  
3 been physically harmed to a greater extent than was found and documented. *Id.* at T 10-11.  
4 Kathleen Peele, a registered nurse and director of the Washoe County Children's Sexual Abuse  
5 Investigation Team, testified that children heal very rapidly and it is not uncommon to find no  
6 evidence of trauma or injury unless the child is examined within 24 hours. *Id.* at T 30-36. Trial  
7 counsel Carl F. Hylin testified that he could not find an expert to testify on his behalf in Washoe  
8 County. *Id.* at 90. Moreover, Hylin stated that he had contacted an expert in San Diego who told  
9 him that the defense petitioner wanted to present was not a viable option. Exhibit 49, T 117-18.

10 The state district court denied petitioner's claim, finding that trial counsel had  
11 investigated experts, and the scope of the investigation was reasonable. Exhibit 50 at 3. The court  
12 further noted that consulting with one well-recognized expert is a reasonable investigation and that  
13 absent some reason to believe another expert would render a different opinion counsel acted  
14 reasonably. *Id.* The Nevada Supreme Court agreed and affirmed the denial of this claim. Exhibit  
15 56. The court noted that counsel's efforts to locate an expert were objectively reasonable. *Id.* at 3.

16 Petitioner's claim is belied by the record. Trial counsel did investigate and attempt to  
17 obtain an expert that would support petitioner's theory of defense, however, counsel could not find  
18 an expert that agreed with the theory. The Nevada Supreme Court's conclusion that petitioner's  
19 claim was without merit is not an objectively unreasonable application of *Strickland*. Furthermore,  
20 the state court's factual determination that counsel acted reasonably in his investigation may not be  
21 overturned unless this court cannot "reasonably conclude that the finding is not supported by the  
22 record." *Cook v. Schriro*, 516 U.S. 802, 816 (9th Cir. 2008); *Miller-El v. Cockrell*, 537 U.S. 32  
23 (2003). The factual findings of the Nevada state courts are presumed correct. 28 U.S.C. §  
24 2254(e)(1). The court will deny this claim.

### 25 **G. Ground Seven**

26 In his seventh claim petitioner contends that he was denied his Sixth and Fourteenth

1 Amendment rights when appellate counsel failed to argue on appeal that the trial court erred in  
2 denying defense counsel's motion for a psychiatric evaluation of the victim.

3 Prior to trial, defense counsel filed a motion to allow a defense psychiatrist to  
4 evaluate the victim as there was, according to the defense, a question regarding her truthfulness.  
5 Exhibit 16. The trial court held a hearing on the issue, where the victim's mother testified about  
6 several instances, unrelated to the case, in which the victim had lied. Exhibit 18. The trial court  
7 denied the motion, finding there was no compelling reason to order a psychiatric evaluation. *Id.* The  
8 court found that Glorietta Thompson's testimony was not convincing or compelling. *Id.*

9 The state district court rejected this claim, finding that the tactical decision not to  
10 raise this claim on appeal did not prejudice the petitioner as the record did not demonstrate  
11 prejudicial error. Exhibit 50 at 9. Furthermore, the state district court noted that the grounds  
12 asserted by the petitioner would not require the court to compel the victim to submit to a psychiatric  
13 evaluation. *Id.* The Nevada Supreme Court affirmed the denial of this claim, relying on *Marvelle v.*  
14 *State*, 966 P.2d 151 (1998). Exhibit 56 at 2. The court found that there no reason to compel the  
15 victim to submit to a psychiatric examination as there was physical evidence to corroborate the  
16 victim's testimony, the state did not have psychologists testifying at trial, and the evidence regarding  
17 whether the victim's mental and emotional state affected her veracity were not compelling. *Id.* The  
18 court also noted that appellate counsel could not have anticipated the ruling in *Marvelle* as that case  
19 was not decided until after the direct appeal, and thus appellate counsel did not act in an objectively  
20 unreasonable manner. *Id.* at 2 n. 2.

21 The Nevada Supreme Court's conclusion that petitioner's claim was without merit is  
22 not an objectively unreasonable application of *Strickland*. Furthermore, this court defers to the  
23 Nevada Supreme Court's ruling on its own state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68  
24 (1991) (stating "federal habeas corpus does not lie for errors of state law"). Although petitioner  
25 contends that the issue would have been meritorious on appeal, the state court's factual  
26 determination that appellate counsel's tactical decision was not objectively unreasonable may not be



1 overturned unless the court cannot “reasonably conclude that the finding is not supported by the  
2 record.” *Cook v. Schriro*, 516 U.S. 802, 816 (9th Cir. 2008); *Miller-El v. Cockrell*, 537 U.S. 32  
3 (2003). There is no indication that the Nevada Supreme Court’s finding is not supported by the  
4 record. This claim is denied.

#### 5 **H. Ground Eight**

6 In his eighth ground for relief petitioner argues that the trial court denied him of his  
7 due process rights when it relied on suspect evidence of prior convictions. At sentencing the parties  
8 argued as to whether a prior felony conviction could be matched to the petitioner based on the  
9 fingerprint analysis. Exhibit 27. The trial judge found there were sufficient assurances that the  
10 criminal history, i.e., the felony conviction, was committed by the petitioner. *Id.* at T 5. The court  
11 also noted that if the petitioner was later able to show that he was not the same person who  
12 committed the prior felony, then he would have an issue on review. *Id.*

13 On direct appeal the Nevada Supreme Court affirmed petitioner’s convictions, finding  
14 that the court did not rely on erroneous evidence in sentencing him. Exhibit 35. The court noted that  
15 petitioner’s identity was adequately proved because the name, date of birth, and social security  
16 number of the individual described in the records matched the petitioner’s name, date of birth and  
17 social security number. *Id.* The court concluded that the petitioner had not shown that the trial court  
18 had relied on highly suspect evidence in sentencing him. *Id.*

19 A sentence violates due process if a defendant can show that the information relied  
20 upon in the probation report is false or unreliable, and that the information made the basis for the  
21 petitioner’s sentence. *United States v. Columbus*, 881 F.2d 785, 787 (9th Cir. 1989); *Oxborrow v.*  
22 *Eikenberry*, 877 F.2d 1395 (9th Cir. 1989) (citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948));  
23 *Shumate v. Newland*, 75 F.Supp.2d 1076, 1096 (N.D. Cal. 1999). “Information is unreliable if it  
24 “lacks some minimal indicia of reliability beyond mere allegation.” *United States v. Ibarra*, 737  
25 F.2d 825, 827 (9th Cir. 1984) (quotation omitted).

26 There is no indication that the Nevada Supreme Court unreasonably applied federal

1 law as is determined by the United States Supreme Court. The Nevada Supreme Court found that  
2 petitioner had not shown that the prior convictions or criminal history listed in the probation report  
3 and relied upon by the sentencing judge were highly suspect. There is no indication that the  
4 sentencing court relied on false or unreliable information beyond petitioner's mere allegation that the  
5 court did so. The court will deny this claim.

#### 6 **I. Ground Nine**

7 In his ninth and final ground for relief petitioner alleges a claim of cumulative error.  
8 The cumulative error doctrine recognizes that the cumulative effect of several errors may prejudice a  
9 defendant to the extent that his conviction must be overturned. *See United States v. Frederick*, 78  
10 F.3d 1370, 1381 (9th Cir.1996). The cumulative error doctrine, however, does *not* permit the Court  
11 to consider the cumulative effect of *non-errors*. *See Fuller v. Roe*, 182 F.3d 699, 704 (9th Cir.  
12 1999), *overruled on other grounds*, *Slack v. McDaniel*, 529 U.S. 473 (2000) ("where there is no  
13 single constitutional error existing, nothing can accumulate to the level of a constitutional  
14 violation"). As the Nevada Supreme Court found, petitioner's claims are without merit, therefore he  
15 has failed to demonstrate any cumulative error. This claim fails.

#### 16 **V. Certificate of Appealability**

17 In order to proceed with an appeal from this court, petitioner must receive a certificate  
18 of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make "a substantial showing  
19 of the denial of a constitutional right" to warrant a certificate of appealability. *Id.* The Supreme  
20 Court has held that a petitioner "must demonstrate that reasonable jurists would find the district  
21 court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S.  
22 473, 484 (2000).

23 The Supreme Court further illuminated the standard for issuance of a certificate of  
24 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

25 We do not require petitioner to prove, before the issuance of a COA, that  
26 some jurists would grant the petition for habeas corpus. Indeed, a claim  
can be debatable even though every jurist of reason might agree, after the  
COA has been granted and the case has received full consideration, that

1 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court  
2 has rejected the constitutional claims on the merits, the showing required  
3 to satisfy § 2253(c) is straightforward: The petitioner must demonstrate  
that reasonable jurists would find the district court’s assessment of the  
constitutional claims debatable or wrong.”

4 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

5 The court has considered the issues raised by petitioner, with respect to whether they  
6 satisfy the standard for issuance of a certificate of appeal, and the court determines that none meet  
7 that standard. Accordingly, the court will deny petitioner a certificate of appealability.

8 **IT IS THEREFORE ORDERED** that the first amended petition for a writ of habeas  
9 corpus (docket #22) is **DENIED**.

10 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**  
11 **ACCORDINGLY**.

12 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
13 **APPEALABILITY**.

14 Dated this 2nd day of September, 2008.

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16 UNITED STATES DISTRICT JUDGE  
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